

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

NEW YORK UNIVERSITY
Employer

-and -

Case No. 2-RC-22082

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, AFL-CIO**
Petitioner

DECISION AND DIRECTION OF ELECTION

Under a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Nicholas Lewis, a hearing officer of the National Labor Relations Board.¹

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding,² it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.³

¹ The Employer filed a Motion to Dismiss the Petition on the ground that extant Board law clearly held that graduate assistants were excluded from the definition of employee under the Act solely because they were students, or in the alternative to stay the proceedings pending the issuance of a decision in *Boston Medical Center Corp. infra*, which was then pending. The motions were denied by the undersigned on May 28, 1999. Appeal to the Board was denied on June 16, 1999.

² Briefs filed by Counsel to the Employer and the Petitioner have been carefully considered.

³ Petitioner excepts to the Hearing Officer's refusal to permit it to offer evidence of collective bargaining by graduate assistants at other universities. Even assuming that there is some relevance to the proffered testimony, the Hearing Officer's decision was within his discretion which was properly exercised to avoid unduly prolonging the hearing. Accordingly, the exception is denied.

2. The parties stipulated and I find that New York University, herein “the Employer” or “NYU,” a not-for-profit corporation, with its campus located in New York, New York, is an institution of higher education. Annually, in the course and conduct of its operations, the Employer derives gross revenues in excess of one million dollars and purchases and receives goods and supplies valued in excess of \$50,000 at its New York facility, directly from suppliers located outside of the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, herein “the Petitioner” is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent employees in the following unit:⁴

All full-time and regular part-time teaching assistants (including teaching fellows), graduate assistants, research assistants, graduate student graders and graduate student tutors who are classified under codes 101, 111, 130, 131 (referred to collectively as graduate assistants) employed by New York University, excluding all other employees, graduate assistants at the Sackler Institute and research assistants in the Physics and Biology Departments, and guards and supervisors as defined by the Act.

The Employer contends that the petitioned-for unit is inappropriate because it consists of individuals, graduate assistants, who are “students,” and not “employees” as defined by the Act. The Employer alternatively argues that even if the graduate assistants come within the definition of Section 2(3) of the Act, policy considerations should lead to their exclusion from statutory coverage. Finally, the Employer asserts

⁴ The unit description was amended at the hearing.

that if the graduate assistants are found to be employees and an election is directed, the only appropriate unit would be a University-wide unit and the graduate assistants in certain science departments should not be excluded as Petitioner urges.

The Petitioner maintains that the graduate assistants are employees covered by the Act and that the unit sought is appropriate. The petitioned-for unit, according to Petitioner, excludes certain research assistants in the Biology and Physics departments and those classified as graduate assistants at the Sackler Institute of Graduate Biomedical Sciences because these individuals are not employees under the Act. Even if these individuals were found to be employees, Petitioner argues, they do not share a community of interest with those graduate assistants in the unit sought.

NYU is a prestigious university comprised of 13 schools, colleges or divisions. The Faculty of Arts and Sciences (FAS) is an administrative unit that consists of 1) the College of Arts and Sciences, and 2) the Graduate School of Arts and Science. Further, there is the 3) School of Law, 4) School of Medicine and 5) Post-Graduate Medical School, 6) College of Dentistry, 7) School of Education, 8) Leonard Stern School of Business, 9) Tisch School of the Arts, 10) Gallatin School of Individualized Study, 11) School of Social Work, 12) Wagner School of Public Service, and 13) School of Continuing and Professional Studies. Among the thirteen schools there are at least 100 departments.

Approximately 35,000 students attend NYU. One-half of the students are undergraduate students, while the other half are graduate students seeking Masters, Ph.D.s (doctoral), or other advanced degrees. To receive a Ph.D. degree, generally the most advanced degree available, graduate students must spend at least five years in pursuit of the degree. A typical progression for a Ph.D. is two years of course work followed by a qualifying exam or exams. The remainder of a doctoral student's time in pursuit of the degree is spent on completing a dissertation. A Masters degree is more

course-based, but students are also required to complete a Masters thesis project or exam at the conclusion of their studies. A Masters degree can be completed in one to three years, but can also function as a pathway to a Ph.D. program.

Of the approximately 17,500 graduate students attending NYU, approximately 1,700 serve as graduate assistants,⁵ graders, and tutors each year. The vast majority of graduate assistants are doctoral students, with the remainder being graduate students seeking Masters degrees. Most graduate assistants are concentrated within the Faculty of Arts and Sciences (799), the Stern School of Business (256), the School of Education (209), and the Tisch School of the Arts (116).⁶ Graduate assistants receive cash (normally called a stipend),⁷ full tuition remission and a bookstore discount in exchange for services they provide to NYU.⁸ The stipend is set forth as a gross amount for the semester, and is paid in bi-weekly checks, through the university payroll department. Federal, state and city payroll taxes are deducted.⁹ The graduate assistants are

⁵ The term “graduate assistant” is used generally to describe those classified as teaching assistants (TAs), research assistants (RAs) and graduate assistants (GAs). Moreover, teaching assistants in one program (the MAP program) are referred to as “preceptors” (described below), and teaching assistants in the School of Education and the Stern School are called “teaching fellows.” Research assistants in the School of Education’s “Metro Center” are known as “tutors.” For purposes of this decision, when the term “graduate assistant” is used, the reference is to all of those individuals. If I am referring to those individuals classified by the Employer as graduate assistants, I will refer to them as GAs.

⁶ The Sackler Institute also has a large number of doctoral students classified as GAs (174) but as discussed below, unlike the GAs in other schools, those at Sackler have no specific assigned duties and are funded by external research grants.

⁷ The amount of the stipend varies depending on department, but the range is from a low of \$6,500 (Metro Center) to a high of approximately \$20,000 (science departments) per academic year.

⁸ Generally, graduate assistants do not receive any other benefits received by other NYU employees (health and dental insurance, life insurance, retirement plan, etc.). The Sackler Institute and the Center for Neural Science (CNS) purchase health insurance for all of their graduate students. Sackler GAs are also eligible to participate in healthcare and dependent care spending accounts and tax-deferred annuity programs. All graduate assistants are covered NYU’s Workers’ Compensation insurance policy.

⁹ Under Section 3121(b)(10)(B) of the Internal Revenue Code, the University does not withhold FICA from the cash portion of the student’s assistantship

designated, for payroll purposes, by the following codes – 101 (GAs and TAs), 130/131 (RAs), 111 (grader or tutor) and 0200 (Sackler GAs – all of whom are classified in the NYU Medical Center pay code system).¹⁰

The most prevalent of graduate assistantships is the teaching assistant (TA). Approximately 870 graduate students were TAs in the spring of 1999, with an additional 153 classified as teaching fellows.¹¹ Many TAs assist faculty members in the teaching of large introductory survey or lecture courses. While some TAs are assigned to courses within the department they are studying, others are placed in an undergraduate program known as the Morse Academic Plan (MAP).¹² MAP TAs, referred to as “preceptors,” and other TAs assigned to assist in the large lecture courses have similar duties.¹³ Typically, in such large lecture courses, the faculty-member professor lectures the students (usually numbering in the hundreds) once or twice a week. In addition to the lecture component, undergraduate students are assigned to small sections known as

received by graduate assistants who maintain full-time equivalent enrollment status, except that FICA is withheld from Sackler GA stipends.

¹⁰ The Employer issued a report in February 1999, summarizing a study of the status of graduate assistantships at NYU. The report declared that as of September 1999, newly entering students who serve as graduate assistants would be coded as follows: 101 (TA); 130 (GA) and 131 (RA).

¹¹ Each department at NYU is allocated money from the central administration (obtained primarily from undergraduate tuition) to be used for funding of teaching assistants.

¹² MAP is the interdisciplinary core curriculum of the College of Arts and Sciences and has four components, all of which are required of all CAS students: 1) expository writing, 2) a humanities/social science sequence called Foundations of Contemporary Culture (FCC), 3) a mathematics/ natural sciences sequence called Foundations of Scientific Inquiry (FSI) and 4) foreign language. A modified version of MAP is required of School of Education and Stern School students. While duties of the MAP preceptors for FCC and FSI courses are the same or similar to other TAs assisting in introductory or lecture courses, duties of expository writing and foreign language TAs differ in that those TAs are the “stand-alone” teacher of the class, as discussed *infra*.

¹³ A MAP preceptorship is considered somewhat more demanding than other TAs, and MAP TAs receive additional compensation. MAP TAs are advised by NYU of the demanding nature of this appointment and are told that they should not accept other employment. Recently, in response to complaints, the workload of MAP preceptors was reduced from three to two sections per semester.

“recitation” or “lab” sections, which the TAs conduct or teach.¹⁴ In conducting the recitation or lab sections, the TA engages in activities that may include reviewing the lecture materials, teaching new material related to the lecture, fostering discussions on the material, answering student questions, and conducting exercises or experiments that enhance the lecture material. In addition to attending the lectures and conducting the recitation or lab sections, the TA is also expected to hold office hours. TA duties also normally include preparing and/or grading exams or other work assignments, proctoring exams, and arranging reserve readings. TAs may also order books, photocopy materials and take attendance. In some cases, the TA will conduct one of the lectures given during the semester, or fill in for the faculty member if he or she is ill. The TA may also participate in the development of the syllabus. In performing these duties, the TA normally meets and consults with the faculty member in charge of the class during the course of the semester.¹⁵ Many other TAs act as the “stand-alone” teacher or the “teacher-of-record” for undergraduate courses.¹⁶ The Expository Writing Program

¹⁴ A small number of TAs are assigned to help in lecture courses which do not have recitation or lab sections associated with them.

¹⁵ In many cases the faculty member is the TA’s advisor or mentor.

¹⁶ Both the Employer and the Petitioner conducted studies analyzing the percentage of undergraduate instruction by TAs. Petitioner’s study examined the number of College of Arts and Sciences (CAS) classes where TAs were teachers-of-record (including recitation and lab sections) and concluded that TAs taught 933 of 1572 classes, or 59.3% of classes. The Petitioner’s analysis of the percentage of CAS core curriculum classes (required MAP classes which include foreign language and EWP) concluded that TAs taught 82.4% of core undergraduate courses. Petitioner used the CAS for its analysis, claiming that CAS is the principal degree-conferring school in the University undergraduate program. In analyzing the percentage of classes taught by TAs in *all* NYU classes (graduate, undergraduate and non-degree) of *all* schools, the Petitioner concluded that TAs taught 20% of these classes. This includes schools where TAs have few (School of Education, Tisch) or no (School of Law and School of Social Work) assignments as the stand-alone teacher in classes. Petitioner also did an analysis based on number of hours of instruction and concluded that TAs taught 55% of the class hours.

The Employer’s study was based on all schools, not just the CAS, and different methodologies were used. First, the Employer looked at the course coverage from a student perspective, and second, the course coverage by department hours of instruction weighted by enrollment (Petitioner also did an analysis based on hours of

(EWP) component of MAP, required of all undergraduate students in the College of Arts and Sciences and most other undergraduates, is staffed almost entirely by TAs.¹⁷ The EWP TAs teach the writing classes (two sections of 15 students each per semester), grade assignments, hold individual conferences, and hold office hours. They are directly supervised by mentors, who are also graduate assistants, and the program is overseen by five Director-faculty members. EWP TAs apply to the EWP program, as opposed to being selected by their own departments or advisors. Part of the application process involves editing a student writing and answering questions on dealing with classroom situations. EWP TAs must have either a Masters or one year of study towards a Ph.D. in order to be eligible, and must commit to teach in the program for at least 2 years (they receive letters which state that they are appointed for two semesters, and that the

instruction, not weighted by enrollment, and concluded that 55% of the class hours were taught by TAs). In analyzing the course coverage from the student perspective, the Employer looked at the amount of time a student would spend with faculty members and TAs. In doing so, the Employer calculated it based on what percentage of time a student would spend with a faculty and TA if the student were to take every course offered by the university. Based on this methodology, a student would see a TA in a lecture, seminar or studio 5% of the time they spent in those classes, and 20.1% of the time spent in a recitation or lab section (for all classes, a student would spend 6.6% of their time in a class with a TA and 89.5 % with a faculty member). In the Employer's second methodology, the hours of instruction were weighted, such that it takes into account the length of the class and number of students in the class. For example, if an introductory physics class consisted of a one-hour lecture by a faculty-member given to 100 students, and ten recitation sessions of ten students each, each led by a different TA, the lecture component would be counted as 6,000 minutes of undergraduate instruction (60 minutes X 100 students), whereas one recitation section would be counted as 600 student minutes (60 minutes X 10 students). Only one of the 10 recitation sections would be counted as TA instruction time, because from the student's perspective, they would be attending one lecture and one recitation session. Based on this weighted by enrollment methodology, the Employer's study concluded that TAs teach 8.9 % of the teaching hours of lectures, seminars and studios; 48.4% (faculty 48.75%) of the weighted teaching hours of recitations and labs, and for all types of classes combined, TAs teach 13.9% of the weighted hours, as opposed to 84.2 % taught by faculty.

¹⁷ TAs teach approximately 95% of the Expository Writing Program classes (some are taught by adjuncts). There are 118 to 128 EWP TAs each semester, depending on the number of undergraduate students. In the course-offering catalog, the EWP TAs and Adjuncts are referred to as "staff."

assistantship is renewable for three years). After teaching for 3 years, EWP TAs are eligible to become EWP TA mentors.

Foreign language instruction, also an undergraduate MAP requirement, is also primarily provided by TAs. TAs teach several classes a week, prepare lessons and exams, correct homework, grade exams and hold office hours. Language TAs may also be assigned to handle student tutorial sessions, assist with special events and newsletters or help faculty members in their research. Teaching assignments are made in part based on linguistic ability. Many language TAs are native speakers of the languages they are teaching.

TAs in the School of Education oversee undergraduate (and some graduate) students who are participating in field placements as student teachers as part of their educational programs. This involves the observation of the NYU student while the student teaches classes to public school students, mentoring the NYU student, and consulting with the classroom teacher on-site and the professor in charge of the program. These field supervision functions are performed almost entirely by TAs, although adjuncts are also hired to perform these functions. The TA may be the only NYU representative observing a student teacher in the classroom. There are other TAs within the School of Education who conduct recitation sections associated with introductory courses and others who assist or teach other types of classes, such as seminars.

In addition to the TAs in the College of Arts and Sciences and in the School of Education, TAs are also available in other schools, primarily Tisch and Stern. Tisch TAs are assigned to undergraduate introductory courses and are expected to perform the traditional TA duties described above, including conducting the recitation sessions. Tisch graduate students who hold a Masters degree may also apply to be an EWP TA. Stern TAs, referred to as “teaching fellowships,” are available to second

year MBA students and to Ph.D. students, and also involve carrying out the TA duties described above.

All TAs attend a mandatory two-day university-wide training seminar. The training, led by faculty and former TAs, covers a variety of issues including teaching techniques, classroom management, and university policies. TAs also receive the “NYU Handbook for Teaching Assistants” which includes tips on teaching and sets forth university policies applicable to the undergraduates regarding registration, adding and dropping courses, the pass/fail option, incompletes and grading, as well as policies dealing with issues such as sexual harassment, behavioral problems and medical conditions of students. There is TA training within departments and TA duties and responsibilities are also often spelled out in departmental handbooks. There is specific training for MAP preceptors, EWP TAs, and foreign language TAs (a weeklong course for French, Spanish, Italian and German).

Other training programs include the International Teaching Assistant Training Program which is required for TAs for whom English is a second language. In the Physics department a teaching practicum was developed for TAs in response to complaints by undergraduates regarding the quality of the TA instruction and the TAs’ grasp of the English language. This is a mandatory for-credit course for Physics TAs. Other departments have workshops and seminars throughout the semester for its TAs. Finally, there is the EQUAL program, which organizes events and services for faculty and TAs on issues of teaching. For example, the program organizes symposia on the philosophical foundations of pedagogy, multiculturalism and teaching social justice. The EQUAL program also facilitates teaching observation and video work.

Serving as a TA is a requirement of obtaining a doctoral degree in NYU’s Physics, Biology and Psychology departments, the Stern School of Business and in the

Center for Neural Science (CNS).¹⁸ All of these departments guarantee full funding to all entering doctoral candidates for the duration of their studies. While these students are serving as TAs, they receive stipends and tuition remission in the same manner as other TAs, but at other times are funded through other various sources. Serving as a TA for two years is required of students receiving MacCracken fellowships, which provide tuition remission and stipends for graduate students for 5 years of study (discussed further below).

Graduate assistants who do not teach or assist in teaching are classified as either graduate assistants (GAs) or research assistants (RAs). As in the case of the TAs, GAs and RAs are required to perform certain services in exchange for their stipend and tuition remission.¹⁹ RAs in the social sciences and humanities generally perform duties associated with assisting a professor in his or her research, such as checking references, doing bibliographic work, obtaining research materials, proofreading, and performing archival work. In departments where professors are involved in experimental research (Economics, Stern, Psychology, some departments in the School of Education), RAs recruit subjects for experiments, collect and analyze data, and enter data onto computers. The faculty member to whom the RA is assigned informs graduate students holding these RAships of the expectations and requirements of the position. Departmental handbooks also set forth RA duties. For example, one of the Stern School handbooks provides a list of possible tasks to be performed, but RAs are advised that

¹⁸ Petitioner disputes that there is a teaching requirement in the Biology Department and claims that it is merely an expectation. The graduate student handbook for the Department of Biology indicates that graduate students programs will “most often” require a TAship.

¹⁹ Those classified as RAs in the science departments who are funded by external faculty research grants (Biology, Physics, Chemistry and the Center for Neural Science (CNS)) and the GAs in the Sackler Institute are not required to perform any specific services for NYU, as discussed *infra*.

the kind of work assigned will depend on the projects of the professor to whom they are assigned.

The services of other GAs and RAs vary widely, and the title given to a particular position may not always match the services performed.²⁰ For example, the School of Education appoints individuals referred to as “tutors” to a program known as the Metropolitan Center for Education (Metro Center).²¹ Tutors are coded as research assistants (code 131), although one could argue they could be classified as GAs. Metro Center tutors, appointed for one-year periods, participate in tutoring and mentoring projects in the New York City public schools, which provide extra academic assistance to students. There are also some individuals classified as GAs who perform mostly research functions (in one instance, a position in the Department of Comparative Literature was referred to as a “Research GA”).

The duties of others classified as GAs throughout the university vary widely. For example, some GAs in the Psychology Department counsel undergraduates in clinical training. GAs in the School of Education’s Department of Music have varied responsibilities such as coordinating jazz ensembles and organizing a high school jazz tour; serving as a liaison for guest composers; or functioning as Director of an NYU company – Village Records. GAs also serve as assistants to Directors of academic programs and there are GAs assigned to recruitment and admissions functions. GAships may entail responsibilities such as organizing workshops, symposia, lecture

²⁰ The February 1999 report issued by NYU summarizing a study done on graduate assistantships declared that henceforth graduate assistantships would be classified so as to correspond to the title, i.e. TAs would be those whose duties focus on teaching skills, RAs would be those focusing on research and GAs would be those focusing on a variety of professional and technical skills. The report further stated that certain graduate assistantships would no longer be considered graduate assistantships if the positions did not comport with NYU’s “commitment to provide assistantship experiences that are directly relevant to students’ academic pursuits and career development.”

series and special events; administering video, slide, film and book collections; or performing editorial and production work, in some cases having responsibility for journals and newsletters. Some GAships have included the assignment of clerical functions.

GAs in the Tisch School, which is comprised of twelve departments in performing and cinematic arts, also perform specific services in exchange for stipends they receive. Tisch itself confers undergraduate Bachelors of Fine Arts (BFAs) and Masters of Fine Arts (MFAs) in departments which train artists for professional careers. Ph.D.'s in cinema studies and performance studies are also available, and these degrees are conferred through GSAS. Both the artistic programs and the scholarly programs have a number of GAships, and the scholarly Ph.D. programs such as Cinema Studies offer TAships as well.²² The GAships vary greatly. Written job descriptions exist for many Tisch GAships for positions such as "Scene Shop Designer/Master Carpenter," "Production Office Assistant," "Costume Shop Assistant," "Scene Shop Assistant/Scenic Artist," and "Stage Lighting Assistant/Master Electrician." The Dramatic Writing Program also offers a variety of GAships, some of which fill administrative needs of a particular program.

²¹ Although called tutors, these are not the same "tutors" classified under Code 111 along with "graders."

²² There were 82 Tisch GAships and TAships for the 1998-99 year in the following departments: graduate film, dramatic writing, performance studies, cinema studies, drama, dance, design, graduate acting, interactive telecommunications, musical theatre, the student affairs office and the dean's office. Thirty-two of these were 100% funded by the particular department. All other GAships were partially funded through federal work-study funds – providing that the department pays 35% of the stipend and the government 65%. Financial need must be demonstrated in order to receive a work study position. According to Tisch's Dean Mary Campbell, some of the positions classified as 100% departmentally funded GAships were converted to work study positions for the 1999-2000 year because the administrative or clerical nature of the job no longer qualified them as GAships pursuant to NYU's new guidelines regarding GAships.

The Stern School of Business graduate programs include a very large MBA program, and a Ph.D. program with a total of approximately 110 Ph.D. candidates. A full-time MBA candidate normally completes the program in two years. Second year MBA students are eligible to compete for a TA position (referred to as a “teaching fellow”) or a GAship in return for which they can receive partial tuition remission.²³ The teaching fellow is similar to a traditional TAship as described above and the GAship is a position with specific duties and requirements. The Stern Ph.D. program, which like other Ph.D. programs has a target completion time of five years, provides full funding for its doctoral students for up to five years. In exchange for this funding Stern doctoral students are required to serve as RAs during their first four years of study and as a TA in the fifth year (the time commitment is 10 hours a week for the first year, and 20 a week thereafter).²⁴

Almost all graduate assistantships require a 20-hour a week time commitment,²⁵ and graduate assistants are generally precluded from seeking other employment. The Graduate School of Arts and Science Bulletin states that graduate assistants “may not accept employment or engage in any other occupation without the permission of the department or the Dean.” Many graduate assistants must sign a document referred to as the “Conditions of Award,” which sets forth requirements of their positions.

While there is no formalized university-wide training for GAs and RAs as there is for TAs, GAs and RAs may receive training in the department in which they work, or they learn on-the-job. As mentioned above, many departments issue handbooks that contain

²³ Tuition remission for Stern MBA graduate assistants ranges from \$5,000 to \$18,000 dollars per year (tuition is approximately \$25,000), but no stipends are given.

²⁴ The Stern Ph.D. program requires RAships and/or TAships because, according to the Employer, unlike the MBA program, Ph.D. students are not training for a business career; rather they aspire to teaching and research positions.

²⁵ There are a few graduate assistantships that require fewer hours, such as the first-year Stern RAship. The evidence in the record revealed that graduate assistants often (especially with regard to TAs) devote more than 20 hours a week to their duties.

information regarding graduate assistant responsibilities and duties, as well as terms and conditions of the position. The Department of Politics graduate handbook, for example, states that RAs are expected to work 20 hours a week performing duties that may consist of “library work, xeroxing of research materials, computer work, and other related matters.” Other departments have written job descriptions. The written job descriptions that exist for the Tisch GAs set forth the responsibilities of the job, the chain of command to be followed on the job, and the time commitment expected (an average of 20 hours). The job descriptions also state that any outside work must be approved and that any hours of work missed must be made up. Costume Shop GAs are given a schedule of GA work time and advised in writing that if a holiday falls on a day normally worked, the time must be made up. The Dramatic Writing Program GAs are required to attend mandatory staff meetings, attend departmental events, and work at the front desk. The Dramatic Writing GAs are advised in writing that their “job performance” is reviewed from year to year.

Stern teaching fellows and GAs are presented with a “contract” which sets forth the terms and conditions of the appointment, such as the time commitment required, and a requirement that any missed hours must be made up. The Stern Ph.D. handbook specifies that the doctoral student’s stipend is contingent on satisfactory performance as a RA, and that an RAship can be terminated. As with most graduate assistantships, outside work must be approved.²⁶ Stern RAs are told to keep track of their hours.

Tutors in the Metro Studies program are issued the “Team Success Resource Book” which sets forth the specific requirements of tutors such as “Terms of the Appointment” (20 hours required – no outside employment permitted); “Attendance” (each tutor is allowed 3 sick days and 3 absences); and “Work Schedule” (the project

²⁶ Stern students are permitted to earn up to \$3,000 in other NYU positions, such as a grader.

director will approve work hours, schedule and reschedule work deadlines, assign tasks, and monitor work progress and performance). Metro Center tutors are required to punch time cards. GAs in the Ettinghausen Library are issued specific guidelines regarding their duties in staffing the library. These GAs are the only NYU representatives responsible for staffing the library, and are each charged with opening and running the library for 15 of their 20 hours required of the GAship.

In addition to being informed of the expectations and rules applicable to the graduate assistantships, graduate assistants are advised of the consequences of poor performance. EWP TAs are told, in writing, that they can be put on probation or replaced if not performing up to par. According to the testimony of one professor, a graduate assistant who is not performing satisfactorily could lose his or her stipend, while not being terminated from the doctoral program (this has not occurred). Other professors testified that if a TA were to perform poorly in the classroom, he or she might be reassigned to perform other services for NYU, but there would be no academic reprisals. The School of Education's Metro Center program advises its graduate assistants that their appointments are contingent on satisfactory performance and attendance. Graduate assistants at Stern are also advised in writing that their assistantship can be terminated.

In addition to the GAs or RAs performing specific services in exchange for their stipends and tuition remission in the various departments as described above, there are graduate students in certain science departments classified as RAs or GAs who receive stipends from monies derived from external faculty research grants. Most of these grants are obtained from the National Institute of Health (NIH) or the National Science Foundation (NSF). There are a small number of individuals classified as RAs in the Biology, Physics and Chemistry Departments and the Center for Neuroscience (CNS)

who are funded by these external faculty research grants.²⁷ The evidence revealed that students classified as RAs in these departments are performing the research required for their dissertation, which is the same research for which the professor has obtained an outside grant.²⁸ No specific services are required of these RAs – the students are simply expected to progress towards their dissertation. RAs in these departments do not specifically apply for these positions (these departments are fully funded). Instead, the positions are awarded to them.

Similarly, graduate students performing research for their dissertation in the Sackler Institute²⁹ receive stipends from external faculty grants from the NIH and the

²⁷ There are approximately 5 such students in Biology (out of 56 doctoral students), 4 in Physics (out of 45-50 doctoral students), and 7 in CNS (out of 29 doctoral students). There was also testimony that there are approximately 10-15 similarly situated RAs in the Chemistry Department. The other doctoral students in these departments may hold TAships requiring specific services, or they may be funded through other sources, such as fellowships.

²⁸ Students chose their dissertation topics after becoming familiar with the focus of the research being conducted in the various labs, and by meeting the professors who run each lab.

²⁹ The Sackler Institute of Graduate Biomedical Sciences is the umbrella organization for all graduate programs at the Medical School. There are approximately 140 Ph.D. candidates and 78 students pursuing a combined MD/Ph.D. Although Sackler is a division of GSAS, it is funded under the Medical School budget, except that some recruiting resources are obtained from the GSAS (FAS). Although the Employer claims that Sackler is not part of the Medical School (see f.n. 317 of the Employer's brief), Sackler Director Dr. Oppenheim's testimony established that Sackler is the Institute of all graduate programs at the Medical School. Sackler's publication listing its research faculty states, "School of Medicine" on its cover. The evidence also established that the seven departments in Sackler are departments of the Medical School, that most faculty for Sackler are Medical School faculty, and Sackler's administrative offices, classrooms and laboratories are located at the Medical School. Sackler students take most classes at the Medical School, although they may occasionally take classes at other locations.

The Medical School is located at 33rd Street and 1st Avenue, adjacent to what was previously known as the NYU Hospital (Tisch Hospital) and the Rusk Institute. Prior to July 1998, the Medical School, NYU Hospital (Tisch) and the Rusk Institute together were known as the NYU Medical Center. In 1998, the NYU Hospitals (Tisch Hospital and the Rusk Institute) split off and merged with certain Mt. Sinai entities, becoming the NYU/Mt. Sinai Health System Organization (HSO). The Medical School remains as an NYU institution and is one of its 13 schools. The Sackler GAs conducting research in Medical School laboratories are supported by faculty research grants that also support research fellows and post-doctoral fellows working in those labs. Also working in the labs are research technicians and post-doctorate researchers who are Medical School

NSF. For some reason, Sackler doctoral students are classified as GAs, not RAs, even though research is the focus of their degree.³⁰ Each and every Sackler doctoral student is classified as a GA and receives funding through outside grants, whereas not all doctoral students in the other sciences (Biology, Chemistry, Physics and CNS) are RAs funded through external NIH or NSF grants – some hold traditional TA positions or are funded through other sources. The record revealed that being classified as a GA in Sackler is co-extensive with being a graduate student and there are no duties required of a GA. Sackler doctoral students do not apply to be a GA; they are simply appointed as such upon their admission into Sackler. The letter advising students of their admission to Sackler does not advise students that they are GAs. It simply states that the student has received a “scholarship” providing for a yearly stipend, as well as guaranteed housing in university owned apartments and health insurance coverage. Students are told that satisfactory academic performance is the only requirement of receipt of the “scholarship” and continuation in the program. The Sackler students are supported during their first year through the School of Medicine budget. By the second year, all Sackler students are supported by the NIH or NSF research grants held by the GA’s research mentor.

employees. Prior to the dissolution of the NYU Medical Center in 1998, the NYU Medical Center Human Relations Department handled employment relations matters (including payroll and benefit administration) for Medical School employees, and for Sackler GAs. Since July 1998 when the HSO was created, the HSO, pursuant to an agreement with NYU, administers the payroll and benefits for Sackler GAs and for medical school employees such as research technicians and post-doctorate researchers. Responsibility for human resources functions for these employees will eventually be taken over by NYU, according to a transition plan in place. Benefits and payroll for faculty and post-doctorate fellows who work in the labs with the Sackler GAs are handled by NYU, not the HSO. Employees of the Medical School have historically not been included in collective-bargaining units of other NYU employees (the collective bargaining agreements for clerical employees, maintenance employees and security guards all specifically exclude Medical School employees and this was usually by agreement between the parties).

³⁰ The payroll code for Sackler GAs is not either 101, 111, or 130 as it is for other GAs. It is “0200” which emanated from the NYU Medical Center coding system.

Graduate assistants are selected primarily on the basis of the merit of the applicant as opposed to financial need.³¹ Many of the graduate assistant positions require specific experience to suit the needs of that position. The MAP program specifically seeks applicants with prior teaching experience and competence with respect to the material to be taught. Being a TA for the EWP program requires demonstrated writing and editing ability. Graduate assistant applications often ask for details regarding previous work experience. Some written job descriptions for Tisch GAs specifically set forth the experience and background needed for the position.

Graduate students in most departments are eligible to receive what are known as MacCracken fellowships.³² The selection of MacCrackens is based on academic merit. Those students accepted as MacCrackens are guaranteed five years of funding, which consists of tuition remission and a stipend.³³ Of course, tuition remission is only applicable for the course work period only, which for most Ph.D. students is 2 years. As a requirement of receiving a MacCracken fellowship, the recipients must serve as a TA for two years. When a MacCracken recipient functions as a TA, he or she is functioning in the same way a TA who is not a MacCracken recipient is functioning. During the two years that the recipient is a TA, the stipend received is classified in the departmental budget as a “personnel” expense, as is the case with all TAships. The MacCracken fellowships are funded by NYU.³⁴

³¹ An exception to this practice is that some Tisch GAs are partially funded by government work-study funds, which require a showing of need (see footnote 20).

³² Sackler, CNS, and Tisch graduate students are not eligible for MacCrackens.

³³ Almost all MacCrackens are awarded to Ph.D. candidates.

³⁴ On the last day of hearing in this matter, NYU submitted evidence that it is restructuring the manner in which GSAS graduate students are funded. According to a Memorandum from Jess Benhabib, Interim Dean of FAS and Catherine Stimpson, Dean of GSAS, *all* doctoral students who enroll in GSAS in 2000-01 and thereafter will be MacCracken Fellows and will be guaranteed a minimum annual (nine-month) stipend of \$13,000 for either four or five years (MacCracken recipients currently constitute 20-25% of GSAS doctoral students). MacCrackens will be required to teach a minimum of 2 semesters, but no more than 6 semesters. According to the memo, this new framework

While many graduate assistantships are assigned on a semester basis, some programs require service for an academic year, and others seek longer commitments. For example, EWP TAs must commit to 2 years of TA work, but many serve from 3 to 5 years.³⁵ Metro Center tutors are appointed for an academic year. MacCracken recipients are required to serve as TAs for 2 years. A study conducted by the Employer concluded that on average, graduate students who serve as graduate assistants do so for at least 3 years (six semesters) which is half of the average time they attend NYU. Most of the graduate student witnesses who testified in this matter served as a graduate assistant for at least 4 semesters and many for 6 or more semesters.

As mentioned above, only about 1,700 of the 17,000 graduate students obtain graduate assistantships each year. Other graduate students may receive scholarships, fellowships, loans or other types of funding in order to assist them financially during their graduate education. While stipends paid to graduate assistants are processed through the NYU payroll department as mentioned above, stipends paid to students receiving fellowships are processed through the General Accounting Office and payments made to graduate students on scholarships are paid through the financial aid office. Graduate assistants are required to complete IRS W-4 and INS I-9 forms—these forms are not required for students receiving funds under a fellowship or scholarship. Payroll taxes are deducted on amounts received by graduate assistants, but not for amounts received pursuant to a fellowship or scholarship. Graduate assistant stipends are designated in departmental budgets as “personnel” costs (this includes the TA semesters of a MacCracken). Fellowship and scholarship amounts are listed in the budget under the

does not apply to programs in Sackler, Cinema Studies, Performance Studies, and the Institute of Fine Arts. The memo states that the new program assures that all GSAS doctoral students will have teaching experience. According to the Employer, this new financial structure will result in the elimination of virtually all GSAS positions previously classified as GAs.

“financial aid” category. Tuition remission for graduate assistants is reflected in the Faculty of Arts and Sciences budget as “fringe benefits.”³⁶

The graders and tutors included in the petitioned-for unit are graduate students whose responsibilities typically involve grading for courses and tutoring of students. Typically, students in these categories receive an academic appointment with the title “grader” or “tutor.” While the petition only includes graduate tutors and graders, both graduate and undergraduate students receive such assignments, generally on a non-recurring basis, with appointments lasting from one week to one semester. Students may receive more than one assignment prior to graduation. Generally, assignments are made at the discretion of each department without admissions committee review of a student’s academic merit. These assignments are conferred without tuition remission.

Typically, graders and tutors are expected to devote 8-10 hours per week to grading and tutoring activities. Cash disbursements related to these activities vary according to academic department policy. In some cases, students receive a fixed amount. In other cases, disbursements are formulaic, tied to the number of students graded or tutored. Payments for these services appear on the budget under the personnel payroll code of 111.

ANALYSIS

The initial issue to be addressed is whether the individuals in the petitioned for unit are employees within the meaning of the Act. Section 2(3) states that the term “employee” is meant “to include *any* employee...unless the Act explicitly states otherwise” (emphasis added). In *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968), the Supreme Court stated that common law agency principles are to be applied when determining who is an employee under the Act (using common law agency test to

³⁵ EWP TAs are told that requests for leaves of absence will be granted only in exceptional circumstances.

distinguish between "employee" and "independent contractor"). See also *Community for Creative Non-violence v. Reid*, 490 U.S. 730 (1989), where the Court emphasized the multi-factor analysis by specifically relying on the Restatement (Second) of Agency, Section 720, the definition of servant.³⁷ In *Sure-Tan, Inc.*, 467 U.S. 883 (1984), the Court noted that the "breadth of §2(3) is striking." holding that undocumented aliens "plainly come within the broad statutory definition of employee."

More recently, in *NLRB v. Town and Country*, 516 U.S. 85 (1995), the Court stated that a broad and literal interpretation of the word "employee" is consistent with the legislative history and with the Act's stated purpose of "encouraging and protecting the collective bargaining process." In *Town & Country*, the Court, using a common law test, reasoned that although someone may be paid by a Union to organize a company, this individual is still an "employee" if he or she is working for the Employer for compensation. The Court stated, "[i]n the past, when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency

³⁶ Tuition remission is non-taxable.

³⁷ The Restatement provides, in pertinent part:

- (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
 - (b) Whether or not the one employed is engaged in a distinct occupation or business.
 - (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
 - (d) The skill required in the particular occupation.
 - (e) Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.
 - (f) The length of time for which the person is employed
 - (g) The method of payment whether by the time or by the job.
 - (h) Whether the work is part of the regular business of the employer.
 - (i) Whether the parties believe they are creating the relation of master and servant.
 - (j) Whether the principal is or is not in business.

doctrine.”³⁸ After looking to the definition of “employee” in the American Heritage Dictionary (“any person who works for another in return for financial or other compensation”) and Black’s Law Dictionary (“a person in service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed”), the *Town and Country* Court concluded that, “[t]he phrasing of the Act seems to reiterate the breadth of the ordinary dictionary definition for it says, ‘[t]he term “employee” shall include any employee.’”²⁸ U.S.C. § 152(3) (1988 ed.) (emphasis added). Thus, the Supreme Court has repeatedly noted that the Board’s historic reading of the definition of “employee” under the Act has been literal and broad.

Recently, the Board used the common law definition of employee in *WBAI/Pacifica Foundation*, 328 NLRB No. 179 (1999). In *WBAI*, the Board cited to the dictionary definitions set forth in *Town and Country*, such as a “person in the service of another ...where the employer has the power or right to control and direct the employee...” and “a person who works for another in return for financial or other compensation.” Finding that volunteers did not satisfy the common law requirement of “compensation,” the Board found these individuals not to be employees covered by the Act. In doing so, it noted that, “[a]t the heart of each of the Court’s decisions is the principle that employee status must be determined against the background of the policies and purposes of the Act.” *Id* at 4.

However, even if students could meet the statutory definition of employee, for many years the Board excluded from employee status medical interns and certain graduate research assistants. In *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), the Board concluded that medical interns and residents (referred to as “housestaff”) who worked at the hospital in order to complete the clinical portion of their medical education

³⁸ *Town and Country Electric*, *infra*, at 94.

were primarily students and therefore not employees. In *St. Clare's Hospital*, 229 NLRB 1000 (1977), the Board further explained that since the medical interns work was an integral part of their educational program, their relationship with the hospital was more academic than economic, and that an academic relationship was not adaptable to the collective bargaining process. In *Leland Stanford Junior University*, 214 NLRB 621 (1974), the Board held that the university's graduate research assistants in the Physics department, who received non-taxable stipends for conducting research that was required for their dissertations, were not employees under the Act.³⁹

In dissent to the majority opinion in *Cedars-Sinai*, Board member Fanning argued that the fundamental question should always be whether one is an "employee," regardless of whether one is "primarily a student." Fanning, seeing no basis administratively to create an exception to the statutory definition of employee, stated that the decision was "not grounded in the statute, the law, or reason."⁴⁰ He wrote that "simply because an individual is 'learning' while performing this service cannot be said to mark that individual as 'primarily a student and therefore not an employee' for purposes of our statute." *Id.* at 256. Recently, the Board, in *Boston Medical Center Corp.*, 330 NLRB No. 30 (1999), overruled *Cedars-Sinai Medical Center* and *St. Clare's Hospital &*

³⁹See also *San Francisco Art Institute*, 226 NLRB 1251 (1976), where the Board held that undergraduate student janitors working for their educational institution were not entitled to the Act's protections because they were primarily students. The Board in *San Francisco Art* also analogized the student janitors to temporary or casual employees.

⁴⁰ It is also noted that in *Physicians House Staff Association v. Fanning*, 642 F. 2d 492 (D.C. Cir. 1980), the Court of Appeals, in reviewing the Board's decision to exclude medical interns and residents from coverage under the Act, four members of the panel stated in dissent that the legislative history of the Act clearly demonstrated that housestaff were employees of the Act. In their view, the Board's majority decision in *Cedars-Sinai* was so contrary to the Act that judicial review was warranted under the extraordinary *Leedom v. Kyne* exception to the normal rule of non judicial review of representation case decisions. While the majority held that the *Leedom v. Kyne* exception was not applicable, it did not endorse the Board's exclusion of all housestaff from the definition of employee. Housestaff, therefore, continued to be excluded from the Act's coverage until the Board recently reconsidered this exception to its usual application of the broad common law definition of employee.

Health Center, and held that the housestaff employed by a hospital are “employees” within the meaning of Section 2(3) of the Act, even though at the same time they are employed, they are students learning their chosen medical craft. After many years of excluding those interns and residents who otherwise fit the definition of “employee” under common law because they were also students, the Board adopted former Member Fanning’s view in his dissent in *Cedars-Sinai*.

The Employer contends that Board law clearly establishes that all graduate teaching and research assistants are excluded from the definition of employee in the statute and that *Boston Medical* did not alter the Board’s decision in this regard. In support of its position the Employer relies on *Adelphi Univ.*, 195 NLRB 639 (1972) and *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974), as well as on the rationale in *Cedars-Sinai Med. Ctr.*, *supra*. While there is some language in these decisions to support the Employer’s contention, it appears that the holdings are not as broad as the Employer suggests. Thus, the issue in *Adelphi* was whether the graduate assistants should be included in the unit with non-student faculty. The Board declined to do so on based on a community of interest considerations. In *Leland Stanford*, the Board held that the graduate research assistants in that case were not employees under the Act. There, the research assistants’ relationship with the University was not grounded on the performance of a given task where both the task and the time of its performance was designated and controlled by the employer. Rather, the Board found it was a situation of students within certain academic guidelines having particular projects on which to spend the time necessary, as determined by the project’s needs. Moreover, any reliance on *Cedars-Sinai* is misplaced as its rationale is no longer consistent with Board law. It is also noted that in *Service Employees International Union, Local 254, AFL-CIO (Massachusetts Institute of Technology)* 218 NLRB 1399 (1975) *enfd.*, 535 F.2d 1335

(1st Cir. 1976),⁴¹ the Board found graduate assistants to be employees although the issue was not specifically raised. Thus, I am unable to conclude, as the Employer asserts, that Board law by which I am bound, excludes all graduate and research and teaching assistants from the statutory definition of employee on the sole basis that they are also students. Even if I were to accept the Employer's broad interpretation of the holdings in *Adelphi* and *Leland Stanford*, the rationale in *Boston Medical* essentially undermines this interpretation and precludes the automatic exclusion of students from the definition of employee. Thus, it appears that the particular nature of the relationship must be examined to determine employee status.

In applying the common law agency definition of employee to the graduate assistants at issue here, it would appear that they clearly fall within that definition. The graduate assistants perform services under the control and direction of the Employer, in exchange for compensation. The Employer has specific expectations of graduate assistants that are often spelled out in departmental or program handbooks, by job descriptions, or by NYU representatives. NYU representatives supervise the work of the graduate assistants. The Employer provides the supplies and the place of work for the graduate assistants. In the case of TAs, NYU provides extensive training as to the nature of the services to be provided, including training on the application of NYU policies to the undergraduates. As for their compensation, graduate assistants' stipends are treated like any other personnel salary in that they are processed through the payroll department and distributed in bi-weekly checks. The IRS treats the stipends as taxable income or "salary for services rendered." Graduate assistants must complete certain forms, such as the INS I-9 form, which are required of employees, but which are not

⁴¹ See also *Yale University*, 330 NLRB No. 28 (1999) where the Board remanded to the ALJ the issue of whether graduate assistants were statutory employees, an action that would not appear necessary if the issue was foreclosed by extant Board law. Similarly,

required of other graduate students. Finally, graduate assistants are subject to removal or transfer. Based on the foregoing, it is clear that the graduate assistants sought by the Petitioner meet the statutory definition of employee under Section 2 (2) of the Act.

Having reached the decision that the petitioned for unit contains individuals who meet the statutory definition of employees, it must next be determined if, as the Employer suggests, policy reasons exist to create an exception for graduate teaching and research assistants sought to be represented in the instant petition. NYU does not dispute that it is an employer engaged in commerce within the meaning of the Act or that graduate assistants perform services for which they receive stipends and tuition remission in exchange for these services. The Employer argues, however, that the services performed by the graduate assistants are so integrated with the academic programs of the students (and sometimes required by the programs) that the graduate assistants services are simply part of their education. Further, NYU claims that the graduate assistants are not “compensated” for these services, rather the stipends and tuition remission they receive is part of an integrated financial aid system.⁴² The Employer notes that when a relationship is guided by business considerations and characterized as a typically industrial relationship, statutory employee status has been found. When, however, the relationship is primarily rehabilitative and working conditions are not typical of the private sector working conditions, the Board has not found employee status. See *e.g. Goodwill Industries of Denver*, 304 NLRB 764 (1991). Here,

the Board denied the special appeal in the instant case on the same issue. See note 1 above.

⁴² In support of its claim that the monies received by the graduate assistants is “financial aid” rather than compensation for services, the Employer argues that students in the fully funded departments receive the same amount of financial aid regardless of whether they are providing services to NYU. They also claim that stipend levels are based on the amount necessary to attract and retain the most qualified students (and that the amount provided is far above the market rate), and that the number of graduate assistants is not based on the needs of the University. None of these arguments persuade me that the graduate assistants are not receiving compensation in exchange for services rendered.

the Employer contends, the relationship is not guided by business considerations and is more analogous to those cases in which employee status has not been found.

The Employer contends, in furtherance of its assertion that graduate assistantships are merely a part of an academic program, that graduate assistants are students receiving training, under the guidance of experienced faculty members, as part of their educational programs leading to graduate degrees. For example, with respect to TAs, the Employer asserts that it runs the graduate teaching program for the benefit of the graduate students and not to facilitate its teaching of undergraduates. The Employer also argues that the fact that graduate assistantships are required as a part of some graduate programs supports its argument that the assistantship is an integral part of the academic program. On the other hand, Petitioner asserts that graduate assistantships, which are only required by a few of NYU's 100 departments, are not related to graduate students' own academic programs because TAs often teach outside of their areas of academic concentration and because they teach courses or perform duties which involve skills and content with which they are already fully versed. Petitioner further argues that TAs are rarely observed and evaluated by faculty members; that the training that they receive is job-related as opposed to career related; that the graduate assistantships often interfere with rather than enhance the graduate students' academic programs and that graduate students accept graduate assistantships generally because they need the money. Petitioner concludes that *Boston Medical* is controlling here and the same finding of employee status must be made.

The Employer asserts that *Boston Medical* is not dispositive of the issue here since the NYU graduate assistants have not yet received their graduate degrees and are enrolled as students in a "traditional academic setting." In *Boston Medical*, on the other hand, the housestaff have completed their graduate degrees and are pursuing post-graduate training. The Employer also attempts to distinguish *Boston Medical* by noting

that the housestaff described in *Boston Medical* spend 80 percent of their time providing services (patient care) for the Employer, whereas graduate assistants normally spend 15 percent of their time performing graduate assistant duties (and 85 percent on their studies). Finally, the Employer notes that housestaff work full time (year round) for 3-5 years, whereas graduate assistants, on average, hold graduate assistantships for one-half of the semesters (14-15 week semesters) they are in graduate school.⁴³

While describing a potential distinction between housestaff and those students in a “traditional academic setting,” the Board in *Boston Medical* noted that the housestaff it was finding to be employees, do not pay tuition or student fees, do not take typical examinations in a classroom setting, or receive grades. These factors supporting a finding of employee status are applicable with respect to the graduate assistants at issue here. The graduate assistants are matriculated students, but do not pay tuition, and for the most part are serving as graduate assistants after the completion of their course work and examinations.⁴⁴ While it is true that in some graduate assistantships the graduate assistants’ work experience is also a learning experience relevant to their academic career development, the in *Boston Medical* also noted that house staff’s “education and student status is geared toward gaining sufficient experience and knowledge to become Board-certified in a specialty,” *Id.* at 10, making it clear that just because educational benefits are derived from employment a finding of employee status is not precluded.

⁴³ Whether the employment is full or part-time is simply not relevant to whether or not individuals are afforded the Act’s protections as “employees.” The Employer conceded that, on average, graduate assistants work for at least 3 years – a substantial period of employment and clearly sufficient to establish employee status.

⁴⁴ In some cases, a graduate student may hold a graduate assistantship while still taking courses and preparing for exams, but any duties performed or academic material that may be part of the graduate assistantship is not part of the course requirements or exam coverage.

While the Employer asserts that the graduate teaching program is run for the benefit of the graduate students and not to facilitate its teaching of undergraduates, it is clear that TAs “play a large role in the undergraduate educational experience at NYU.”⁴⁵ Under either the Petitioner’s or the Employer’s analysis, (see footnote 16), TAs teach a significant number of NYU’s courses.⁴⁶ Most of the courses TAs teach are the core undergraduate courses. The evidence also revealed that the number of TA positions available is tied to undergraduate enrollment, not graduate enrollment.⁴⁷ Moreover, the Employer’s argument is undermined by the fact that being a graduate student is not synonymous with being a graduate assistant. Notably, the many graduate students who are not classified as either GAs, RAs or TAs do not perform services for NYU in exchange for compensation as part of their academic program. Finally, there is evidence that graduate assistants are subject to removal or transfer. For example, the evidence revealed that a poorly performing TA would be removed from the classroom, but that there would be no *academic* reprisals for poor teaching.

While it is a not-for-profit institution, the Employer is engaged in commerce with in the meaning of the Act [*Cornell University*, 183 NLRB 329 (1970)] and is competing with other schools of higher learning for student enrollment. The undergraduate students

⁴⁵ The NYU “Handbook for Teaching Assistant.”

⁴⁶ Further evidence of NYU’s reliance on TAs for undergraduate instruction is its creation of a special for-credit course for physics doctoral students on how to be a TA. This came about as a result of complaints by undergraduate regarding the TAs’ abilities, as well as their English skills.

⁴⁷ A 1995 NYU document planning the implementation of the MAP program stated that TAs would play a key role – “it is assumed that they will each conduct two recitation sections per term, at least initially. Given that load, an increase in the total number of teaching assistantships in FAS will be necessary. Teaching assistants will be drawn mainly from the ranks of advanced graduate students, including MacCrakens, but in some areas M.A. students, adjuncts, and post-docs may be suitable as well.” The NYU “Handbook for Teaching Assistants” states that TAs are used to “help professors to maintain high levels of undergraduate teaching as well as easing the time burden on faculty, allowing faculty to devote more time to research interests.” The University employs approximately 450 TAs each year, which is also about the number of full time professors in the Faculty of Arts and Sciences.”

at NYU, qua customers, pay for the services they receive, which are provided to a large degree by the graduate assistants sought by the instant petition. If the services were not provided by the graduate assistants, they would be provided by instructors who may be statutory employees. The graduate assistants are evaluated on the quality of their work performance under direction and control by the Employer. These essential elements establish the relationship akin to that in a traditional business environment. It is not analogous, as the Employer suggests, to the relationship in a rehabilitation setting where the trainees are allowed to work at their own pace and are not subject to production quotas and other standards of performance. *Cf. Goodwill Industries of Denver, supra* and *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987). Moreover, the fact that individuals are learning aspects of their trade or profession is not a basis for an exception to employee status. See *UTD Corp.*, 165 NLRB 346 (1967) and *General Electric Co.*, 131 NLRB 100 (1961). While the cited cases involve non professional employees, no legitimate basis has been offered why those in a professional learning environment should be treated differently for purposes of collective bargaining particularly where the statute specifically includes professionals in the definition of employee. Section 2 (12). In this regard, see *Wurster, Bernardi & Edmmons, Inc.*, 192 NLRB 1049 (1971) describing the licensing process for graduates of architecture schools who were professional employees as defined in the statute.

Similarly, the fact that some departments require service as a graduate assistant as part of the academic program is not a basis to deny them collective bargaining rights. Just as in *Boston Medical*, the interns, residents and fellows were required to complete their internship, residency, or fellowship as part of their medical training. here the doctoral students in certain departments at NYU are required to serve as a TA in order to obtain a Ph.D. (Biology, Physics, CNS, Psychology and the Stern School all have a teaching requirement). These happen to be the same departments that offer full funding

for their students during the course of their doctoral studies, with service as a TA as a condition of that funding. Further, MacCracken fellowship recipients, who can be from any department, must also serve as a TA for two years in order to receive the five years of funding provided by a MacCracken.

Finally, the Employer argues the policy considerations relating to the particular nature of the university setting justify the denial of collective bargaining rights to all graduate assistants even if they are not excluded from the statutory definition of employee.⁴⁸ In this regard, the Employer argues that if it is required to engage in collective bargaining over the graduate assistants' working conditions, "the freedom that NYU presently has to introduce...a program based on educational policy will be lost. In the future, any such program would have to be bargained with the Union" (Employer's brief p.302). NYU also asserts that collective bargaining with graduate assistants will discourage mentoring relationships between graduate students and their faculty advisors. According to the Employer, "anyone with experience in collective bargaining knows that the introduction of bargaining here will have a chilling effect on such

⁴⁸ The Employer claims in its brief that "it is well established that persons who otherwise fall within the definition of 'employee' under the Act may nonetheless be denied collective bargaining rights where there are pervasive policy reasons for doing so." The Employer cites to *NLRB v. Bell Aerospace Co.* 416 U.S. 267 (1974)(managerial employees excluded from coverage) and *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass*, (retirees) 404 U.S. 157 (1971) for this proposition. However, as the dissent noted in *Physicians National House Staff Association v. Fanning*, 642 F.2d 492 (1980), these decisions did not rest on "policy reasons," but instead were based upon a careful examination of the legislative history of the Act. In fact, the court reasoned in *Allied Chem.* in finding that retirees are not covered by the Act, that the term "employee" must be read literally and by its plain meaning as "those who work for another for hire." 404 U.S. at 166. Further, the dissent in *Physicians National House Staff Association* pointed out that the Act requires the Board to cover "any employee" and if it is free to decide that housestaff, although like employees, are "primarily students" and therefore not covered, it would also be free to decide that "...plumbers or carpenters, although they 'possess certain employee characteristics' are 'primarily' artisans and therefore not employees within the meaning of the Act." *Id.* at 511. Although an extreme example, it demonstrates the danger of the Board relying on "policy reasons" to exclude from the Act's coverage those who otherwise fall within the Act's broad definition of "employee".

relationships.”⁴⁹ The Employer argues that collective bargaining will interfere with the four essential academic freedoms of “who may teach, what may be taught, how it shall be taught and who may be admitted to study.” *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

Although the mission of a university is clearly different than that of an economically motivated business, this distinction is not a valid basis to exclude teachers from the definition of employee. It is only when the faculty is found to have managerial status has employee status been denied. Compare *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) and *Boston University*, 281 NLRB 798 (1986) to *University of Great Falls*, 325 NLRB 83 (1997) and *Cooper Union of Science & Art*, 273 NLRB 1768 (1985). The conclusion that graduate assistants are employees entitled to engage in collective bargaining, of course, does not imply that the four essential elements of academic freedom referred to by the Employer are necessarily mandatory subjects of collective bargaining. Indeed, it is precisely because collective bargaining negotiations can be limited to only those matters affecting wages, hours and other terms and conditions of employment that the critical elements of academic freedom need not be compromised. And, of course, the obligation to bargain does not involve the obligation to concede significant interests.

It thus appears that the underlying rationale of the Employer’s contention that academic freedom will be compromised by the obligation to engage in collective

⁴⁹ The Employer raises several other arguments as to why collective bargaining would not work in the academic setting. For example, it asserts that in departments where graduate students are fully funded and students all receive the same level of funding regardless of whether they are graduate assistants or whether they receive a scholarship, collective bargaining *could* result in the graduate assistants receiving higher stipends than the other students. This is speculative on the part of the Employer, but I fail to see the danger in higher stipends for certain students who happen to be providing services to NYU in addition to focusing on their own studies. In fact, most departments currently have graduate students receiving widely varying amounts of funding. In some it is primarily the graduate assistants who have any income at all.

bargaining is essentially a rejection of the appropriateness of graduate students speaking through a common voice for even under current circumstances, the University must negotiate with graduate assistants individually over their terms and conditions of their employment. Graduate assistants who refuse to accept the terms of the Employer's offer of employment are free to reject them. The limitation on academic freedom the Employer anticipates, therefore, is not the obligation to offer employment conditions on terms the graduate assistants are willing to accept (i.e. negotiate with the graduate students as individuals), but the obligation to do so collectively. The asserted anticipated interference with academic freedom essentially appears to be a fear that collective action over graduate students conditions of employment will be more influential and powerful than individual action. The issue thus framed is whether the NLRB should deny collective bargaining rights to employees because of this anticipated impact of collective bargaining. This suggestion runs directly contrary to the express purposes of the Act set for in the preamble wherein it states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

As the Board noted in *Boston Medical*, "the parties can identify and confront any issues of academic freedom as they would any other issue in collective bargaining. The parties in this case are not novices to collective bargaining....if there is anything we have learned in the long history of this Act, it is that unionism and collective bargaining are

dynamic institutions capable of adjusting to new and changing work contexts and demands in every sector of our evolving economy.” *Id.* at 13,14.

Accordingly, absent specific exception in the statute or in Board law, I must conclude that there is simply no basis to deny collective bargaining rights to statutory employees merely because they are employed by an educational institution while enrolled as a student.

The Sackler GAs and the few RAs in the sciences (Biology, Physics, Chemistry and CNS) funded by external grants, must be separately considered. These GAs and RAs have no expectations placed upon them other than their academic advancement, which involves research. They receive stipends and tuition remission as do other GAs, RAs, and TAs, but are not required to commit a set number of hours performing specific tasks for NYU.⁵⁰ The research they perform is the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding. The funding for the Sackler GAs and the science RAs, therefore, is more akin to a scholarship.

As noted above, in *Leland Stanford Junior University*, *supra*, which remains Board law, it was held that research assistants in the school’s physics department were not employees. As is the case here with the RAs in the sciences and the GAs in Sackler, the RAs in *Leland* were funded by external grants and were performing research on their dissertation topics as opposed to being required to perform specific

⁵⁰ The Employer asserts that these GAs and RAs do perform services for the University in that they help NYU fulfill its obligations under the research grant. NYU further claims that it benefits from the RAs research because the publications that result from the research increase the faculty member’s stature and reputation and the faculty member is better able to attract future research grants, or to continue existing grants. This, in turn, leads to attracting more students, expansion of areas in which to research, attracting donors and otherwise enhancing NYU’s reputation as a research university. While all of this may be true, it is not directly relevant to the inquiry of whether or not an individual is providing services to the Employer under its control in exchange for compensation, and I have concluded that these particular individuals classified as RAs and GAs do not.

research tasks. The Board concluded that “the relationship of the RA and Stanford is not grounded on the performance of specific tasks where both the task and the time of its performance is designated and controlled by the employer. Rather, it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary as determined by the project’s needs.” *Id* at 623. Former Board member Fanning later noted in his *Cedars-Sinai* dissent that the *Leland* Physics RAs were not being excluded from coverage because they were students, but because, “they do not work or perform a service for an employer.” *Cedars-Sinai* at 255 (emphasis in original). The same is true of the RAs in the sciences and the Sackler GAs here who are supported by outside grants.⁵¹ Based upon all of the facts and the applicable standard, I must conclude that the Sackler GAs and the Biology, Physics and CNS RAs are not employees under the Act.⁵² While Petitioner only seeks to exclude the Biology and Physics RAs from the unit, it appears from the record that CNS RAs and RAs in the Chemistry Department also work under external NIH and NSF grants and are not required to perform specific services. Accordingly, they also are excluded from the unit.

I also find that the graduate students who act as “graders” and “tutors” should not be included in the unit. There is little record evidence regarding the graders and tutors, but the parties stipulated that they receive appointments lasting from one week to one semester and that cash disbursements related to these activities vary according to academic department policy. In some cases, students receive a fixed amount, while in

⁵¹ The Employer notes that there are RAs in Psychology, Economics and the Stern School whose stipends are also funded by faculty research grants. However, it appears from the record that the RAs in these departments are assigned specific tasks, and that they work under the direction and control of the faculty member, as opposed to the Sackler GAs and the science RAs who are working on their own dissertation.

⁵² Sackler GAs have FICA and Workers’ Compensation deducted from their stipends, as well as the standard payroll taxes, but the presence of these factors are not dispositive of employee status. Further, all Sackler GAs and CNS doctoral *students* receive paid health insurance, which they receive as *students* not because they are graduate assistants (non-RA CNS students also receive this benefit).

other cases, disbursements are formulaic and tied to the number of students graded or tutored. While graders and tutors perform services at the direction of the Employer in exchange for compensation, their employment is sporadic and irregular. The varying assignments (from one week to one semester) are for relatively small, finite periods of time, and there was no evidence that graders and tutors can anticipate a string of assignments or the same assignment one semester after another. Thus, graders and tutors are temporary employees. Where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment, such employees are excluded as temporary. *Indiana Bottled Gas Co.* 128 NLRB 1441 f.n. 4 (1960); *Owens-Corning Fibergalss Corp.*, 140 NLRB 1323 (1963); *Sealite, Inc.* 125 NLRB 619 (1959), *E.F. Drew & Co.* 133 NLRB 155 (1961).

Based on the foregoing, I find that the following employees constitute an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

Included: All teaching assistants, graduate assistants, research assistants, (including teaching fellows, research fellows, Metro Center tutors, and preceptors), who are classified under codes 101, 130, 131 (referred to collectively as graduate assistants) employed by New York University.⁵³

Excluded: All other employees, graders and tutors, graduate assistants at the Sackler Institute and those research assistants funded by external grants in the Physics, Biology, Chemistry and the Center for Neuroscience (CNS) Departments, and guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and

⁵³ Petitioner indicated on the record that it would proceed to an election in any unit found appropriate.

Regulations.⁵⁴ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁵⁵ Those eligible shall vote whether they desire to be represented

⁵⁴ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held that Section 103.20 (c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB No. 52 (1995).

⁵⁵ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **April 10, 2000**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

for collective bargaining purposes by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO.⁵⁶

Dated at New York, New York

April 3, 2000

(s) *Daniel Silverman*

Daniel Silverman
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

Codes - 177-2424-0100
177-2477

⁵⁶ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **April 17, 2000**.